

1991

# State of Utah v. Gary Alfred Mitcheson : Petition for Rehearing

Utah Supreme Court

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Don Blackham; Attorney for Appellant.

Robert B. Hansen; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent, :

-vs-

GARY ALFRED MITCHESON,

Defendant-Appellant. :

Case No.  
14629

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PETITION FOR REHEARING  
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APPEAL FROM THE JUDGMENT OF THE SEVENTH  
JUDICIAL DISTRICT COURT, IN AND FOR CARBON  
COUNTY, STATE OF UTAH, THE HONORABLE EDWARD  
SHEYA, JR., JUDGE, PRESIDING  
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ROBERT B. HANSEN  
Attorney General

EARL F. DORIUS  
Assistant Attorney General

236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

DON BLACKHAM

3535 South 3200 West  
Salt Lake City, Utah 84119

Attorney for Appellant

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent, :

Case No.  
14629

-vs-

GARY ALFRED MITCHESON,

Defendant-Appellant. :

-----  
PETITION FOR REHEARING

\_\_\_\_\_  
The plaintiff-respondent petitions this Court for rehearing in the above entitled case pursuant to Utah Rules of Civil Procedure, Rule 76(e), for the reasons that (1) the Court did not consider a material fact in arriving at its decision, (2) the Court misconstrued the State's position, and (3) the Court's opinion creates uncertainty in the law as to the quantum of evidence necessary to mandate that a requested jury instruction be given.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

EARL F. DORIUS  
Assistant Attorney General  
Attorneys for Respondent

BRIEF IN SUPPORT OF  
PETITION FOR REHEARING

POINT I

PETITION FOR REHEARING IS PROPERLY BEFORE THE  
COURT UNDER THE FACTS OF THIS CASE.

This Court has previously recognized that to make an application for a rehearing is a matter of right. Cummings v. Nielson, 42 Utah 157, 129 P.619 (1913). Nevertheless, plaintiff-respondent recognizes that this right is not absolute and that a petition for rehearing should not be utilized to challenge areas of the Court's decision which respondent merely disagrees with or considers unsatisfactory. Nor should the rehearing be used to reargue grounds originally presented. Cummings v. Nielson, supra; Beaver County v. Home Indemnity Co., 88 Utah 1, 52 P.2d 435 (1935). The standard established by this Court in determining whether a petition for rehearing is proper was expressed long ago in Brown v. Pichard, 4 Utah 292, 11 P. 512, reh. den., 4 Utah 292, 9 P. 573 (1886):

"To justify a court in granting a rehearing it must be convinced that there has been a failure to consider some material point in the case; that there has been error in the conclusions heretofore arrived at; or that some matter has been discovered unknown at the time of the hearing."

See also Cummings v. Nielson, supra, at 624, wherein the Court stated the following:

"When this court. . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . . If there are some reasons. . . such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed, and, if it is meritorious, its form will in no case be scrutinized by this court." (Emphasis added).

The remaining points of this brief will adequately show that this petition for rehearing is properly before this court on the grounds that this court misconstrued or misapprehended certain material facts of this case in reaching its decision, and there are adequate "other good reasons" for rehearing the case - namely, the Court's opinion has left uncertain the viability of the evidence standard in State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969).

#### POINT II

THE OPINION OF THE COURT DID NOT ANSWER, CONSIDER, OR REFUTE THE SPECIFIC FINDINGS OF THE TRIAL COURT.

In its opinion in this case filed February 15, 1977, this Court did not discuss or mention the specific findings of Judge Edward Sheya of the Carbon County District Court on the defendant's request for an instruction on defense of habitation. According to the Supplemental Record, which the state did not have available for inclusion in its original Brief, but which was filed with the Court on January 5, 1977, and was alluded to during respondent's oral argument before this Court, Judge Sheya specifically found that there was not any evidence to support the requested instruction on defense of habitation, a defense provided in Utah Code Ann. § 76-2-405 (Supp. 1975). The following excerpts from pages three and four of the Supplemental Record clearly reflect the trial court's position and its concern with avoiding error:

"'A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the others unlawful entry into his habitation. However, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if, one, the entry is made or attempted in a violent and tumultuous manner and he reasonably believes that the entry is attempted to be made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that the force is necessary to prevent the assault or offer of personal violence.'

The court, in the first place,  
was unable to find from the evidence  
that any force was necessary to  
prevent anyone's unlawful entry into  
the habitation. No one had advanced  
to the point where they became an  
immediate danger to the habitation.  
The evidence as I recall, was the people  
were standing, some were standing out  
by the truck. Some were standing out in  
the road. But I can't recall any evidence  
that anyone was advancing menacingly  
toward the door. Or was so near the  
door that something had to be done to  
stop the individual or individuals.

Now on this matter of when you can use  
deadly force, the statute says, and the  
instruction, of course, quoted the language  
of the statute. That the entry has to  
be made or attempted in a violent and  
tumultuous manner. Number 1. That is  
one element. I can't recall any evidence  
to the effect that these people who  
came in were engaging in violent or  
tumultuous conduct. I think he said he  
looked out the window and saw these car  
lights, but I can't recall evidence which  
would support the theory that they entered  
in a violent and tumultuous manner. So  
it seems to me that there is one element  
that is missing. And I can't find from  
the evidence that the Defendant reasonably  
believed that an entry was being attempted  
or made for the purpose of assaulting  
either himself for anybody in the  
dwelling. As has been mentioned, the  
argument between these individuals,  
the defendant and the deceased and a  
brother of the deceased was regarding  
tires. He had been forewarned that they  
were coming down to retrieve these tires  
that were claimed by them. Nothing  
was said to the effect we are going to  
come down and get you. We are coming down  
to do you great bodily injury. We are  
coming down to kill you. I can't recall



any evidence that they were going to  
do him any bodily harm or inflict  
personal violence upon his person.  
Or upon the person of his sister.  
I can't recall any evidence to support  
that. Or anyone else in the home, or  
that the Defendant felt it was necessary  
that force was necessary, that is  
deadly force to prevent the assault or  
offer of personal violence. If it  
didn't exist, of course, he couldn't  
have intended to prevent it. So I  
am unable, aside from the fact that  
it is inconsistent with the accidental  
theory, that aside from that I cannot  
see where the evidence supports this  
instruction. In that there was no  
violent tumultuous entry that he could  
not have reasonably believed that it  
was made, that the entry that was made  
was for the purpose of assaulting him-  
**self** or his sister. Or that he had to  
use this force to prevent any such  
assault because it didn't exist. So  
because the court could see no evidence  
to support this instruction, I didn't  
want to commit error to support this  
instruction, I didn't want to commit error  
in giving it because our Supreme Court  
says it is error to give an instruction  
unless the evidence supports it." (Emphasis  
added).

Although this Court held that it was reversible error for the trial court not to give the requested instruction on defense of habitation, it never refuted or specifically overruled the trial court's finding that no evidence was submitted to warrant the instruction. That leaves the paradoxical situation of having accepted the trial court's judgment that no supporting evidence was submitted, yet having decided that the instruction which therefore has no evidentiary basis must be given.

Respondent submits that unless or until the trial court's findings are set aside for error or for abuse of discretion, the requested instruction was properly refused by the trial court, requiring this Court to affirm the conviction. In State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947), reaffirmed in State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969), this Court held that an appropriate instruction on a theory of the case is required if there is any substantial evidence to justify giving such an instruction. Under this standard, defendant in the instant case was not entitled to the requested instruction, based on the trial court's determination that there was not any supporting evidence.

### POINT III

THE COURT DID NOT ALLUDE TO OR DISCUSS  
RESPONDENT'S CHIEF CONTENTION ON THIS APPEAL;  
NAMELY, SUFFICIENCY OF THE EVIDENCE TO JUSTIFY  
AN INSTRUCTION ON DEFENSE OF HABITATION.

On page two of the opinion, Justice  
Crockett, writing for the Court, said:

"The argument that the  
defendant was not entitled to  
that instruction is: (1) that  
the sister's home was not his  
habitation; and (2) that it was  
inconsistent with his own  
testimony and theory of defense  
that the shooting was an accident."

Respondent submits that neither of these theories  
articulate the State's argument to this Court  
requesting affirmation of the jury verdict. The  
only mention of (1) was at page seven of respondent's  
brief:

"Even if, arguendo, this  
Court accepted that for purposes  
of this statute, appellant's  
habitation that evening was his  
sister's home, although he was  
merely staying the night, appellant  
could not surmount other obstacles  
. . . ."

Clearly, respondent did not contend that even under appropriate circumstances, appellant could not use the defense of habitation defense in his sister's home; rather, respondent acquiesced to the theory that another's home could in some situations be appellant's habitation.

The alleged theory (2) of respondent did not even appear in the State's brief. While this apparent inconsistency of defenses was noted by the trial court and perhaps mentioned before this Court on oral argument, it was in no sense relied upon by respondent in its request that Gary Mitcheson's conviction for second degree murder be affirmed.

Petitioner-respondent heavily relied upon and submitted to this Court the theory that defendant had failed to introduce sufficient competent evidence at trial to allow the defense of habitation instruction to be given. This Court did not meet this critical issue directly and therefore should grant a rehearing to consider its merits.

#### POINT IV

THE COURT'S OPINION HAS CREATED CONFUSION ABOUT THE QUANTUM OF EVIDENCE NECESSARY TO WARRANT THE SUBMISSION OF A REQUESTED INSTRUCTION TO A JURY.

State v. Castillo, supra, holds that each party is entitled to have his theory of the case which is supported by substantial evidence submitted to the jury. In the instant case, this Court, by not mentioning or referring to the trial court's specific findings on the evidence on this issue, has left the impression that no evidence or minimal evidence is all that is required to merit an instruction on a theory of the case. Until this Court resolves such confusion, trial court judges can no longer be sure of the proper evidentiary standard relating to jury instructions. Petitioner-respondent, at the very least, requests that this Court comment upon the viability of Castillo in light of the Mitcheson opinion.

#### CONCLUSION

Because this Court did not address the State's position and did not directly deal with the

trial court's findings, confusion over the evidentiary standard for requested jury instructions has arisen. Petitioner-respondent therefore requests that a rehearing be granted to resolve the issues outstanding.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

EARL F. DORIUS  
Assistant Attorney General  
Attorneys for Respondent